

66031-4

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No. 66031-4-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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HOMESTREET BANK, a Washington state chartered savings bank,

*Respondent,*

v.

JOHN B. NORRIS, individually and on behalf of his marital community,

*Appellant.*

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COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

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**OPENING BRIEF OF APPELLANT**

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## **ASSIGNMENTS OF ERROR**

**Assignment of Error No. 1.** The trial court erred in granting summary judgment in favor of the Bank.

**Issue:** Did the trial court lack personal jurisdiction over the “marital community?”

**Issue:** Is whether the Guarantees constituted a community obligation an issue of fact?

**Issue:** Should the trial court should have considered John’s supplemental response?

**Issue:** Should the trial court have granted John leave to file an amended answer adding an affirmative defense?

**Issue:** Is the “fair value” of the property an issue of fact?

**Issue:** Should the trial court have granted John a continuance to permit discovery on the issue of “fair value?”

## **NATURE OF THE CASE**

This is an action by a bank to enforce a guarantee signed by a married person for a business loan, where the business was owned by the signing spouse as his separate property. The bank seeks to enforce the guarantee against community property.

## **STATEMENT OF THE CASE**

Appellant John Norris [“John”] is the sole shareholder of Norris Homes, Inc. [“Norris Homes”] and Norris Homes is the sole member of Forest Ridge, LLC [“Forest Ridge”]. John is married to Rose Monica Norris [“Monica”]. Before John and Monica were married in 1991, they signed a prenuptial agreement specifically providing that John’s construction business was and would continue to be his sole and separate property. CP 44.

Respondent HomeStreet Bank [“Bank”] made several acquisition, development and construction loans to Norris Homes and Forest Ridge. The loans were secured by real property and were guaranteed by John. Monica did not sign the Guarantees, was not aware John had signed the Guarantees, did not consent to him signing the Guarantees, and did not ratify the Guarantees. CP 45.

Norris Homes and Forest Ridge defaulted on the loans and the Bank foreclosed on the properties securing the loans. The Bank submitted

“credit bids” at the foreclosure sales in the amount of appraisals it obtained prior to the foreclosure sales. The foreclosure sales resulted in a shortfall of approximately \$6.5 million. The Bank then commenced this action to recover a deficiency judgment for the shortfall against John and “his marital community.” CP 34.

### ARGUMENT

**1. The standard of review of the trial court’s order granting summary judgment is de novo.**

“Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. . . . When reviewing a grant of summary judgment, the appellate court engages in the same inquiry as the trial court, considering facts and reasonable inferences therefrom in the light most favorable to the nonmoving party and reviewing questions of law de novo.”

*Security State Bank v. Burk*, 100 Wn. App. 94, 97, 995 P.2d 1272 (2000).

“Even where the evidentiary facts are undisputed, if reasonable minds could draw different conclusions from those facts, then summary judgment is not proper.”

*Chelan County Deputy Sheriffs’ Ass’n v. County of Chelan*, 109 Wn.2d 282, 295, 745 P.2d 1 (1987).

“The summary judgment procedure is intended to dispose of useless trials on formal issues that have no evidentiary basis, or which, even if factually supported, could not as a matter of law lead to a favorable result for the opposing party.” WASHINGTON CIVIL PROCEDURE BEFORE TRIAL DESK BOOK § 39.30 (WASH. STATE BAR ASS’N 1981). “A trial is not

useless but absolutely necessary where there is a genuine issue as to any material fact.” *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P.2d 605 (1960). “A court will grant summary judgment only when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law.” *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992). “A material fact is one upon which the outcome of the litigation depends.” *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). “One who moves for summary judgment has a burden of proving that there is no genuine issue of material fact, irrespective of whether he or his opponent would, at the time of trial, have the burden of proof on the issue concerned.” *Preston v. Duncan*, 55 Wn.2d 678, 682, 349 P.2d 605 (1960). “The moving party is held to a strict standard. Any doubts as to the existence of a genuine issue of material fact is resolved against the moving party.” *Atherton Condominium Ass’n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). “Facts and all reasonable inferences therefrom are considered in the light most favorable to the nonmoving party, and summary judgment should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.” *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 518, 826 P.2d 664 (1992). “It seems obvious that in situations where, though evidentiary facts are not in dispute, different inferences may be drawn therefrom as to ultimate facts such as

intent, knowledge, good faith, negligence, *et cetera*, a summary judgment would not be warranted.” *Preston v. Duncan*, 55 Wn.2d 678, 681-82, 349 P.2d 605 (1960). “A trial is not useless but absolutely necessary where there is a genuine issue as to any material fact.” *Id.* at 681.

**2. The trial court erred in granting summary judgment in the Bank’s favor.**

The Bank was not entitled to summary judgment because:

- a. the trial court lacked personal jurisdiction over the “marital community;”
- b. whether the Guarantees constituted a community obligation is an issue of fact;
- c. the trial court should have considered John’s supplemental response;
- d. the trial court should have granted John leave to file an amended answer adding an affirmative defense;
- e. the “fair value” of the property is an issue of fact; and
- f. the trial court should have granted John a continuance to permit discovery on the issue of “fair value.”

**3. The trial court lacked personal jurisdiction over the “marital community.”**

The Complaint identified the defendant as “John B. Norris,

individually and on behalf of his marital community,” such that the Bank seeks to impose liability for the Guarantees on John and Monica’s community property. CP 1. However, the “marital community” is not recognized as a legal entity in Washington. *DeElche v. Jacobsen*, 95 Wn.2d 237, 622 P.2d 835 (1980). “To sue a sole proprietorship, one must sue the individuals compromising the business.” *Dolby v. Worthy*, 141 Wn.App. 813, 816, 173 P.3d 946 (2007). Likewise, to sue a “marital community,” one must sue both spouses. Monica was not named and was never served in this matter. The trial court lacked personal jurisdiction over the “marital community” and could not enter a judgment against it. Therefore, the judgment against the “marital community” is void and the Bank’s Motion for Summary Judgment should have been denied as to the “marital community.”

**4. Whether the Guarantees constituted a community obligation is an issue of fact.**

Even if the Bank had named and served Monica, the Guarantees constituted John’s separate liability. There is no basis to impose liability on the “marital community,” because separate debts may not be enforced against any portion of community property.

The Guarantees are John’s separate liability. John is the sole shareholder of Norris Homes, Inc. and Norris Homes, Inc. is the sole

member of Forest Ridge, LLC. John and Monica have a prenuptial agreement specifically providing that John's construction business was and would continue to be his sole and separate property. CP 44. Guarantees executed by a sole shareholder of a corporation owned as separate property are separate debts. *Union Securities Co. v. Smith*, 93 Wash. 115, 160 Pac. 304 (1916). Accordingly, the Guarantees executed by John are his separate liability.

Guarantees for separate debts may not be enforced against community property. Although judgments arising out of the separate *torts* of a spouse may be enforced against the tortfeasor's half-interest in community property (*DeElche v. Jacobsen*, 95 Wn.2d 237, 622 P.2d 835 (1980)), separate *debts* may not be enforced against either spouse's interest in community property – not even the signing spouse's interest. *Colorado Nat'l Bank v. Merlino*, 35 Wn. App. 610, 668 P.2d 1304 (1983); *Nichols Hills Bank v. McCool*, 104 Wn.2d 78, 701 P.2d 1114 (1985).

**5. The trial court should have considered John's supplemental response.**

It was unclear from the Complaint or the Bank's Motion for Summary Judgment whether the Bank was seeking a judgment against the "marital community" comprised of defendant John B. Norris and non-party Rose Monica Norris. The Bank's Motion for Summary Judgment

included no discussion whatsoever of community liability. CP 29-37. The issue of whether the Bank could obtain a judgment against the “marital community” was first raised in the Bank’s Response to Plaintiff’s Motion for Summary Judgment. CP 46-54. Because the issue should have been raised in the Bank’s motion, John requested that the trial court consider his supplemental response addressing the community property issue. The trial court erred in denying John’s request. CP 68-69.

**6. The trial court should have granted John leave to file an amended answer adding an affirmative defense.**

John requested leave of the trial court to file an amended answer adding the affirmative defense that the Bank’s claim against the “marital community” was barred by the Federal Reserve Board’s Regulation B, 12 C.F.R. Part 202. The trial court erred in denying John’s request. CP 70-71.

The Equal Credit Opportunity Act [“ECOA”], 15 U.S.C. § 1691 *et seq.*, prohibits creditors from discriminating against credit applicants on various bases, including marital status. The ECOA is implemented by the Federal Reserve Board’s Regulation B, 12 C.F.R. Part 202 [“Regulation B”], and the staff’s official interpretation of Regulation B in Part 202, Supp. I. The purpose of the regulation is “to promote the availability of credit to all creditworthy applicants without regard to . . . sex [or] marital status. . . .” 12 C.F.R. § 202.1(b). This applies to all extensions of

consumer and business credit transactions. Specifically, Regulation B states: “A creditor shall not discriminate against an applicant on a prohibited basis regarding any aspect of a credit transaction.” 12 C.F.R. § 202.4(a).

Regulation B governs, among other actions, when a creditor may require an applicant’s spouse’s signature, and what constitutes a joint application such that a spouse’s signature would be required. Section 202.7(d)(1) states:

“Except as provided in this paragraph, a creditor shall not require the signature of an applicant’s spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor’s standards of creditworthiness for the amount and terms of the credit requested. *A creditor shall not deem the submission of a joint financial statement or other evidence of jointly held assets as an application for joint credit.*” (Emphasis added.)

12 C.F.R. § 202.7(d)(1).

Even if a corporation is creditworthy, a creditor may require the personal guarantees of directors, officers, and/or partners, as well as the shareholders in the case of a closely held corporation. FDIC 2004 Guidance Letter, Section V. However, the creditor is prohibited from requiring the signature of a guarantor’s spouse, just as it is prohibited from requiring the signature of the applicant’s spouse, unless the creditor first determines the guarantor is not creditworthy. *Id.*; 12 C.F.R. Pt. 202, Supp.

I, Paragraph 7(d)(6), comment 2. The creditor may require additional signatures in that case, but may not require the additional signing party to be the guarantor's spouse. FDIC 2004 Guidance Letter, Section V.

A violation of Regulation B in the case of a spouse's guaranty voids the guaranty as to the guarantor's spouse. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28 (3rd Cir. 1995).

By seeking a judgment against the "marital community," the Bank is attempting to accomplish indirectly what Regulation B prohibits it from accomplishing directly (requiring Monica's signature on the Guarantees). Thus, the Guarantees cannot be enforced against John or Monica's interest in community property.

**7. The "fair value" of the property is an issue of fact.**

John opposed the Bank's Motion for Summary Judgment in part on the grounds that the fair value of the properties sold at the trustee's sales was a question of fact. CP 39-41. RCW 61.24.100(5) provides as follows:

"In any action against a guarantor following a trustee's sale under a deed of trust securing a commercial loan, the guarantor may request the court or other appropriate adjudicator to determine, or the court or other appropriate adjudicator may in its discretion determine, the fair value of the property sold at the sale and the deficiency judgment against the guarantor shall be for an amount equal to the sum of the total amount owed to the beneficiary by the guarantor as of the date of the trustee's sale, less the fair value of the property sold at the trustee's sale or the sale price paid at the trustee's sale, whichever is greater, plus

interest on the amount of the deficiency from the date of the trustee's sale at the rate provided in the guaranty, the deed of trust, or in any other contracts evidencing the debt secured by the deed of trust, as applicable, and any costs, expenses, and fees that are provided for in any contract evidencing the guarantor's liability for such a judgment. If any other security is sold to satisfy the same debt prior to the entry of a deficiency judgment against the guarantor, the fair value of that security, as calculated in the manner applicable to the property sold at the trustee's sale, shall be added to the fair value of the property sold at the trustee's sale as of the date that additional security is foreclosed. This section is in lieu of any right any guarantor would otherwise have to establish an upset price pursuant to RCW 61.12.060 prior to a trustee's sale."

In *National Bank of Washington v. Equity Investors*, 81 Wn.2d 886, 506 P.2d 20 (1973), decided before RCW 61.24.100(5) was enacted, the Supreme Court described the guidelines for fixing an upset price:

"The statute says that the court, 'in ordering the sale, may in its discretion, take judicial notice of economic conditions, and after a proper hearing, fix a minimum or upset price to which the mortgaged premises must be bid or sold Before confirmation of the sale.' We think that the statute means that the upset price should reflect 'the fair value of the property,' for the term 'fair value' appears twice and the term 'value' once in the statute. The court thus, upon application for the confirmation of a sale, if it has not theretofore fixed an upset price, may conduct a hearing, establish the value of the property, and, as a condition to the confirmation, require that the fair value of the property be credited upon the foreclosure judgment.

"Accordingly, where, in the court's sound discretion at a foreclosure or other judicially ordered distress sale, an upset price should be fixed, the next step is to fix the amount. The statute calls not for what the court would determine to be the Minimum value, but rather its Fair value. As we said in *Lee v. Barnes*, *supra* the court 'should

assume the position of a competitive bidder determining a fair bid at the time of sale under normal conditions.’ This means that, in deciding upon fair value at a foreclosure sale, the court may consider the state of the economy and local economic conditions, the usefulness of the property under normal conditions, its potential or future value, the type of property involved, its unique qualities, if any, and any other characteristics and conditions affecting its marketability along with any other factors which such a bidder might consider in determining a fair bid for the mortgaged property. The court may properly receive any competent evidence, whether opinion or of direct facts which might affect the amount of such a bid.”

81 Wn.2d at 926.

As stated in RCW 61.24.100(5), the Deed of Trust Act contemplates that the determination of “fair value” following a nonjudicial foreclosure serves as a substitute for establishing an upset price prior to a judicial foreclosure. Just as the establishment of an upset price prior to a judicial foreclosure requires “a proper hearing,” the determination of “fair value” following a nonjudicial foreclosure also requires an evidentiary hearing. The trial court should have denied the Bank’s Motion for Summary judgment, because there was a genuine issue of material fact as to the “fair value” of the properties foreclosed.

**8. The trial court should have granted John a continuance to permit discovery on the issue of “fair value.”**

Alternatively, John requested that the trial court order a continuance to permit discovery and give him an opportunity to present

evidence on the “fair value” of the properties.

CR 56(f) provides as follows:

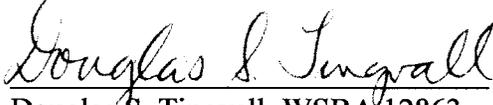
“Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.”

John was served on May 7, 2010 – only three months before the summary judgment hearing. John had not yet conducted any discovery or retained an expert witness on the issue of “fair value,” an issue essential to his defense. Under CR 56(f), John requested that the trial court order a continuance of at least 90 days to enable him to obtain evidence as to the “fair value” of the properties. The trial court erred in denying John’s request. CP 72-73.

### **CONCLUSION**

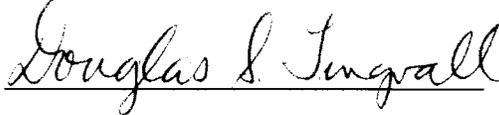
The trial court lacked personal jurisdiction over the “marital community” and the judgment against the “marital community” is void as a matter of law. In addition, there are genuine issues of material fact as to whether the Guarantees constituted a community obligation. Accordingly, the summary judgment in favor of the Bank should be reversed and the case should be remanded for trial.

Respectfully submitted on December 24, 2010.

  
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**DECLARATION OF SERVICE**

I certify that I mailed a copy of the Opening Brief of Appellant to Matthew D. Green, Williams Kastner & Gibbs, 601 Union St Ste 4100, Seattle WA 98101-2380, postage prepaid, on December 24, 2010.

  
Douglas S. Tingvall